# CJEU Opens Door to Legal Challenges to Euro Rescue Measures in Key Decision

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A key reason for the inability of claimants to successfully challenge programme conditionality and the resulting austerity inherent in euro-area rescue deals, has been the barrier between the actions of EU institutions and the international bodies that carried out the bailouts. The recent decision of the CJEU in *Ledra Advertising* breaks down that barrier with unpredictable consequences.

During the height of the euro debt crisis in 2010, the European Council took a decision to establish a crisis response mechanism with the financial firepower to rescue euro member states unable to raise finance in markets. This mechanism, operating as an intergovernmental organisation under public international law, was christened European Stability Mechanism (ESM) and is the predominant crisis resolution mechanism for countries of the euro area. The crucial point about the operation of ESM is that it is only authorised to make use of lending instruments subject to appropriate conditionality. The fourth intervention of the ESM (after Ireland, Greece and Portugal) in the euro debt crisis was in Cyprus in 2013. Cyprus faced a crisis in its banking sector, with its two biggest banks considered to be insolvent. A package of financial assistance of up to €10 billion was agreed by a MoU in April 2013, with the ESM financing up to €9 billion and the IMF around €1 billion. In order to receive the loans, Cyprus needed (amongst other measures) to restore the soundness of its banking sector by thoroughly restructuring and downsizing financial institutions. What this meant for the banks was that the country's second-biggest bank, Laiki, was wound down, and Cyprus' biggest bank, the Bank of Cyprus, was restructured by wiping out shareholders and bailing in bondholders. Uninsured depositors incurred significant losses.

This solution was welcomed by the Cypriot government and European institutions, but not by investors and depositors in the banks in question. In May 2013 actions were brought before the CJEU General Court asking that the Commission (and the ECB) pay compensation for losses and that relevant decisions are overturned. The General Court dismissed the actions claiming inadmissibility and lack of legal foundation. The court argued that an application seeking compensation for damage allegedly caused by an EU institution must identify the institution, show the causal link between offending conduct and the damage suffered. The key issue in contention became whether, in cases of non-contractual liability, the conduct which it is claimed gave rise to the damage suffered could be imputed to an EU institution (or to its servants in the performance of their duties) under Article 268 TFEU and 340 TFEU. Otherwise, a claim for compensation that is directed against the European Union and is based on the mere illegality of an act or course of conduct that has not been adopted by an institution must be rejected as inadmissible. The court concluded that although the ESM Treaty entrusts the Commission and the ECB with certain tasks relating to the implementation of the objectives of that Treaty, the duties conferred on them within the ESM Treaty do not entail any power to make decisions of their own and, that the activities pursued by those two institutions solely commit the ESM. Consequently, even though the adoption of the MoU involved negotiations with the Commission and the ECB, the court did not have jurisdiction, in so far as the claim was based on the illegality of certain provisions of the MoU. Since neither the ESM nor Cyprus were among the institutions, bodies, offices or agencies of the European Union, the court had no jurisdiction to examine the legality of acts which they have adopted together.

In appealing this decision, investors claimed that the court misinterpreted role of the Commission and the ECB in the adoption of the Cypriot MoU, arguing that those institutions were the true authors of the bail-in subsequently implemented and as a consequence the court failed to examine the conformity of the MoU with EU law. They challenged the idea that while EU institutions play in role in the ESM framework, this does not bring any resulting actions within the EU legal order. The ECJ, departing from the AG's opinion, found that it is not possible to prevent unlawful conduct (linked, as the case may be, to the adoption of a memorandum of understanding on behalf of the ESM) from being raised against the Commission and the ECB in an action for compensation under

Articles 268 and 340 TFEU.

The reason for this startling decision is that the tasks conferred on the Commission and the ECB within the ESM Treaty do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties. As regards the Commission in particular, it is stated in Article 17(1) TEU that the Commission 'shall promote the general interest of the Union' and 'shall oversee the application of Union law'. Consequently, the tasks allocated to the Commission by the ESM Treaty oblige it to ensure that MoUs concluded by the ESM are consistent with EU law. The Commission therefore retains, within the framework of the ESM Treaty, its role of guardian of the Treaties and it should refrain from signing MoUs whose consistency with EU law is in doubt. The ECJ concluded that the General Court erred in law in finding that the adoption of the MoU text could not formally be imputed to the Commission or the ECB, and that it did in fact have jurisdiction to consider an action for compensation based on its illegality.

Did this mean that the Cypriot MoU was illegal? The answer is no. In looking at the substantive claim for compensation, the court found that in view of the objective of ensuring the stability of the banking system in the euro area, and having regard to the imminent risk of financial losses to which depositors with the two banks concerned would have been exposed to (if they had failed), the measures taken did not constitute a disproportionate and intolerable interference with the appellants' right to property. Consequently, the Commission and the ECB could not be considered, by having permitted the adoption of the MoU, to have contributed to a breach of the appellants' right to property.

If there was no compensation awarded, why is this case still significant? The decision in *Ledra Advertising* is significant as it breaks down the barrier between European institutions and international-treaty based structures that have sprang up to deal with the needs of euro-area crisis response. This opens the door to legal challenges to the bailout programmes of the EFSF/ESM offering an avenue to a plethora of claimants to unpick the questionable legal underpinnings of conditionality and austerity policies. European courts face interesting days ahead.

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